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IN THE

Supreme Court of the United States

October Term, 1947

No. 1083 47

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Petitioners,

vs.

MICHAEL J. FANNING, individually and as Postmaster of the City of Los Angeles, California,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit and Brief in Support Thereof.

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AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Petitioners,

vs.

MICHAEL J. FANNING, individually and as Postmaster of the City of Los Angeles, California,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit.

To the Honorable, The Supreme Court of the United States:

The petitioners, Al Williams and Al Williams Health System of Los Angeles, Inc., a corporation, respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered December 6, 1946 [R. 287] (..... F. (2d) .....), affirming a judgment of dismissal of the District Court for the Southern District of California, Central Division [R. 271, 276].

Statement of the Matter Involved.

Petitioners filed suit in the District Court to enjoin respondent, who is the local Postmaster at Los Angeles, California, from enforcing a fraud order of the Postmaster General [R. 257] purporting to have been issued under the so-called Postal Fraud Order Statutes (U. S. C. A. Title 39; Secs. 259, 732, R. S. 3929, 4041; 28 Stat. 964, 26 Stat. 466). Petitioners sought injunctive relief upon the ground that the Postmaster General had exceeded his authority in issuing the fraud order [R. 259, 264] and, by leave of Court, filed their amended complaint [R. 230, 231] eliminating all constitutional questions.

Respondent moved to dismiss solely upon the ground that petitioners had failed to state a claim upon which relief could be granted [R. 229]. The District Court reluctantly granted the motion upon the ground that the Postmaster General is an indispensable party to the action [R. 276], basing the ruling upon the case of *Neher v. Harwood*, 128 F. (2d) 846, with which the Court stated it did not agree but felt bound to follow [R. 274, 275].

Petitioners rely not only upon the allegations of ultimate fact in their amended complaint [R. 231] which must here be assumed to be true, but also upon the complete transcript of evidence taken before the Postoffice Department [R. 44-218], and the Findings of Fact of the Postmaster General [R. 219] which are, respectively, "Exhibit A" and "Exhibit B" attached to the amended complaint, together with the fraud order in question which is therein set forth in full [R. 257]:

Basis of Jurisdiction of This Court.

(a) The jurisdiction of this Court is invoked under section 240 Judicial Code, 28 U. S. C. A., Sec. 347.

(b) Petitioners have eliminated all questions involving the constitutionality or validity of the Statutes involved [R. 230, 231], which are the so-called "Fraud Order Statutes" (39 U. S. C. A., Secs. 259, 732), the material portion of said section 259 reading as follows:

> "The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct Postmasters at any Post Office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the Postmaster at the office at which it was originally mailed with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such Postmasters shall be by them returned to the writers thereof * * *."

Said section 732 contains the same material provisions but forbids the payment of any postal money order. Both sections are invoked by the fraud order in question.

(c) The judgment of the Circuit Court of Appeals was made and entered December 6, 1946. The petition was filed in this Court after January 6, 1947, and before March 6, 1947.

Questions Presented.

I. When the authority of the Postmaster General to issue a fraud order is the ultimate question raised by the complaint, is he an indispensable party to an action against the local Postmaster to enjoin the enforcement of the order?

II. Is not the question of the statutory power of the Postmaster General a question of law which may be determined in any appropriate forum without his personal presence particularly when the transcript of the entire proceedings in the Postoffice Department is before the Court?

III. Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under them?

IV. Has the Postmaster General the authority under these statutes to issue a fraud order based solely upon opinion evidence which is clearly insubstantial, or can his authority be questioned only upon constitutional grounds?

V. On the question of whether or not the Postmaster General is an indispensable party to an action to enjoin the local Postmaster from enforcing a postal fraud order, does a conflict exist between the cases of *Varney v. Warehime*, 147 F. (2d) 238; *Greer v. Cline*, 148 F. (2d) 380, and *Jarvis v. Shackleton Inhaler Co.*, 136 F. (2d) 116, all from the Sixth Circuit, and *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J.) on the one hand and this case before the Court and *Neher v. Harwood*, 128 F. (2d) 846, Ninth Circuit, on the other?

VI. Has the Postmaster General the authority under these statutes to ruin completely the reputation and long-established legitimate business of a reputable citizen and to publicly stamp him a fraud, without substantial evidence, and solely upon the mere expression of opinion of one medical witness who states that the true facts of the matter upon which he expresses the opinion can easily be determined by a simple experiment in any laboratory, which experiment was not performed by him or by anyone else?

VII. In an action against the local Postmaster to enjoin his enforcement of a fraud order so issued by the Postmaster General, and in which the complete record of the proceedings in the Postoffice Department is before the Court, do the principles of equity and practical justice require that the one against whom the order is directed must, to obtain relief, travel 3,000 miles to the forum of the residence of the Postmaster General, whose personal presence would not be likely anyway and who has the right of intervention and the facilities at his disposal for proper representation in any forum?

VIII. In similar cases arising under these statutes and in which the entire proceedings in the Postoffice Department are before the Court, is it a valid objection to an action to stop quickly the ruinous destruction of reputation and property attendant upon the enforcement of a fraud order, that the principal who is outside the Court's jurisdiction is the one to be bound, when he is perfectly at liberty to intervene if he wishes or to defend through the local Postmaster as his agent?

IX. Does the case of *Neher v. Harwood*, 128 F. (2d) 846, hold that the authority of the Postmaster General

under these fraud order statutes can only be questioned upon constitutional grounds and, if it does so hold, is it in conflict with *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, or *Jarvis v. Shackleton*, 136 F. (2d) 116, Sixth Cir., or *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J.)?

X. If the Postmaster General issues a fraud order upon insubstantial evidence or upon opinion evidence alone, is he an indispensable party to an action against the local Postmaster to enjoin the enforcement of the order, when the entire record of the proceedings in the Postoffice Department is before the Court?

XI. Did the Circuit Court err in affirming the judgment of the District Court in this case?

Reasons for Allowance of the Writ.

REASON I.

The ultimate question in the case before the Court is whether or not the Postmaster General is an indispensable party to the action. On this question the Circuit Court of Appeals of the Ninth Circuit has rendered a decision in this case and in the case of *Neher v. Harwood*, 128 F. (2d) 846, in conflict with the decisions of the Sixth Circuit Court of Appeals, in the cases of *Varney v. Warehime*, 147 F. (2d) 238, and *Jarvis v. Shackleton Inhaler Co.*, 136 F. (2d) 116, and with *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J.), the Sixth Circuit and the District Court in the Third Circuit holding that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the court is such an agent in the matter involved that it is equitable and practical to proceed

to an adjudication of the issue with finality, and the Ninth Circuit holding, in effect, that the Postmaster General is an indispensable party to every action to enjoin the enforcement of his fraud order unless his authority is questioned on constitutional grounds.

REASON II.

That Congress never intended to place in the hands of the Postmaster General the authority or power to issue a fraud order with its attendant personal ruin of the one against whom it is directed, solely upon mere opinion evidence which varies greatly from time to time according to the many personal or group prejudices of those who express them; that such a power is abhorrent to our traditions, and the Postmaster General *is without authority* to issue a fraud order upon insubstantial or opinion evidence alone, and he is not an indispensable party to an action to enjoin its enforcement if he does so and, for that reason, the Circuit Court of Appeals for the Ninth Circuit has, in this case and in the case of *Neher v. Harwood, supra*, rendered a decision upon an important question of General Law probably untenable and in conflict with the weight of authority and in conflict with *Jarvis v. Shackleton, supra*, and *Varney v. Warehime, supra*, both from the Sixth Circuit.

REASON III.

That the decisions of the Circuit Court of Appeals of the Ninth Circuit in the case of *Neher v. Harwood, supra*, and in affirming the decision of the District Court in this case upon the authority of *Neher v. Harwood*, are decisions of an important question of General Law probably untenable and in conflict with the weight of authority expressed

in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, and the long line of approving cases culminating in *Estep v. United States* (1946), 90 U. S. Supreme Court, L. Ed., Advance Opinion 405, and are decisions of an important question of General Law probably untenable and in conflict with the weight of authority expressed in *Varney v. Warehime*, 147 F. (2d) 238, and *Jarvis v. Shackleton*, 136 F. (2d) 116, in that the said decisions of the Ninth Circuit hold, in effect, that the Postmaster General is an indispensable party to all actions to enjoin the enforcement of a postal fraud order unless his authority is questioned upon constitutional grounds.

REASON IV.

That the decisions of the Circuit Court of Appeals of the Ninth Circuit in the case of *Neher v. Harwood, supra*, and in affirming the decision of the District Court in this case upon the authority of *Neher v. Harwood*, are decisions of an important question of Federal Law not previously settled, *i. e.*, is the Postmaster General an indispensable party to an action against the local Postmaster to enjoin the enforcement of a postal fraud order, and if so, under what circumstances? (See *Brooks v. Dewar*, 313 U. S. 354, 359.)

REASON V.

That the question of whether or not the Postmaster General is an indispensable party to an action to enjoin the enforcement of his fraud order by the local Postmaster when the order is not supported by substantial evidence but is supported only by mere opinion evidence, is one upon which the Circuit Courts are in admitted disagreement and the question is of such wide importance and

public interest and concern that it should be definitely decided by this Court.

REASON VI.

That the Circuit Court of Appeals for the Ninth Circuit has decided a Federal question in a manner probably in conflict with applicable decisions of this Court, in disregarding and refusing to follow the rule clearly pronounced in the case of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, that these fraud order statutes were intended to cover only cases of actual fraud in fact, in regard to which opinion formed no basis, and that *the Postmaster General has no authority* to issue a fraud order unless the question is one of fact, as distinguished from mere opinion.

For these reasons, it is respectfully submitted that this petition should be granted.

AL WILLIAMS,
AL WILLIAMS HEALTH SYSTEM
OF LOS ANGELES, INC.,
Petitioners.

We hereby certify that the foregoing petition is well founded and not interposed for delay.

IRVING M. WALKER,
Attorney for Petitioners.

RICHARD L. NORTH,
Of Counsel.

State of California, County of Los Angeles—ss.

Al Williams, being first duly sworn, deposes and says: That he is one of the petitioners named in the foregoing Petition in the above entitled action; that he has read said Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to such matters that he believes it to be true.

AL WILLIAMS.

Subscribed and sworn to before me this 24th day of February, 1947.

(Seal) MARVA WEEDE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires February 3, 1950.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, a corporation,

Petitioners,

vs.

MICHAEL J. FANNING, individually and as Postmaster of the City of Los Angeles, California,

Respondents

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

I. The opinion of the District Court was filed by Judge Peirson M. Hall, March 11, 1946 [R. 275], and judgment was entered March 19, 1946 [R. 277]. Said opinion appears in the Appendix to this brief.

II. The *per curiam* opinion of the Circuit Court of Appeals was filed and entered December 6, 1946 [R. 286-287] but does not appear in the Federal Reporter.

III. No petition for rehearing was filed.

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Section 240, Judicial Code, 28 U. S. C. A., Sec. 347, which reads as follows:

> "(a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

As established by the amended Complaint [R. 231], the action is one arising under the postal laws. Jurisdiction in the District Court was therefore under 28 U. S. C. A., Sec. 41 (6). Jurisdiction in the Circuit Court of Appeals was under the provisions of 28 U. S. C. A., Sec. 225(a) and (d).

This is a petition for certiorari to the Circuit Court of Appeals of the Ninth Circuit in a case involving the question as to whether or not the Postmaster General is an indispensable party to an action against the local postmaster to enjoin the enforcement of a postal fraud order.

The jurisdiction of this Court is invoked upon the following grounds:

1. That there is a conflict between Circuit Courts of Appeals as to whether or not the Postmaster General is an

indispensable party to an action against the local postmaster to enjoin his enforcement of a postal fraud order.

2. That the Circuit Court of Appeals of the Ninth Circuit has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

3. That the said Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court.

4. That the said Circuit Court has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Statement of Facts.

Petitioner Al Williams is a citizen and taxpayer of the City of Los Angeles and has, for more than 20 years, been engaged in the business of reducing and conditioning business and professional men in California.

In 1916 he was athletic instructor at the Olympic Club in San Francisco and, during the First World War, originated a system of rifle disarming for defense purposes and was sent by the Government to teach at Fort Sill, Oklahoma; Camp Borden, Georgia, and to the Presidio at San Francisco, from which he returned to the Olympic Club at the close of the war.

In 1935 he became interested in concentrated nutrition and devised a system designed to eliminate hunger and the desire to overeat, and he has since experimented with concentrated foods and their effect upon the human body. He has revised the eating schedules of at least 50,000 individuals and has thus gained practical knowledge and experi-

ence concerning certain concentrated food tablets which are a part of his reducing program. For more than 10 years he has engaged in reducing those who are overweight, by means of a program which consists of prescribed diets, exercise and the taking of concentrated food tablets with fruit juice, milk, soup or water. These tablets are composed only of vegetable concentrates and are designed to take away hunger and the desire to overeat. Said reducing program also includes the use of a body Massage Creme to tighten the skin and help correct flabby fat tissue caused by the loss of weight. A substantial part of said business has been conducted through the United States mails over the entire period, without complaint by any user of said tablets or creme, and petitioner Al Williams has enjoyed a reputation for honesty and integrity of a high order wherever his name is known. [R. 233-235.]

Petitioner Al Williams Health System of Los Angeles, Inc., is a corporation which has never been an officer or agent of or for petitioner Al Williams or any of the other four fictitious designations named in the fraud order of the Postmaster General; that said fraud order is not directed against said corporation [R. 257-258], nor is it named therein nor was it ever given notice of any hearing before the Postoffice Department, and did not file an answer or appear at any hearing, but the mail of said corporation nevertheless has been and is being returned by the respondent to the senders thereof, marked "Fraudu-

lent", pursuant to said fraud order. [R. 257-258, 266-268.]

On or about May 28, 1945, petitioner Al Williams received a Specification of Charges from the Postoffice Department and a notification that such charges would be taken up for disposition at a hearing to be held in Washington, D. C., on the 20th day of June, 1945, at 10:00 A. M.

Said petitioner appeared at the hearing and filed an answer to the charges [R. 52-56], and a hearing was had and testimony presented, of which a complete transcript is attached to the Amended Complaint as "Exhibit A." [R. 57-218.]

At the said hearing before the Postoffice Department, much to the surprise of petitioner, the prosecution presented and relied solely upon the opinion evidence of one doctor, to establish fraud [R. 103-156].

The petitioner presented at said hearing no evidence but his own [R. 156-216], although he offered in evidence testimonials in the form of about 2,000 unsolicited letters of commendation which were refused [R. 168-171] and he was denied the right to testify to the results of his years of experience in the use upon himself and others, of the tablets and creme, and their ability to actually perform and fulfill the claims which he made for them, and which form the basis of the charges [R. 161-168], upon the ground that he was not a medical expert.

After the hearing before the Postoffice Department, petitioner Al Williams realizing that he was to be judged by the opinion testimony of one doctor and that his good reputation and extensive business which he had established over a long period of years might be utterly destroyed, filed a motion with the Department to reopen the case for the purpose of taking the depositions of medical experts living in Los Angeles, who are familiar with his reducing program, and, supporting the motion were filed the affidavits of two such Doctors of Medicine, but said motion was denied [R. 260-264].

Then, having in mind the testimony of that doctor [R. 153-154] that the important question of whether or not the tablets took hunger away could easily be established as a fact in any laboratory by the use of a kymograph, and having learned that a kymograph was available for such tests at the laboratory of the University of Southern California, said petitioner filed a motion with the Postoffice Department to reopen the case in order to receive in evidence the results of such tests to be made at appellant's expense, and said motion was also denied [R. 228].

On December 10, 1945, the Postmaster General issued what is known as a "fraud order" against petitioner Al Williams and five others fictitiously named therein [R. 257-258] and on January 7, 1946, petitioners filed their complaint herein against the Postmaster at Los Angeles, to enjoin him from enforcing said fraud order upon the ground that the Postmaster General exceeded his author-

ity, and on February 1, 1946, the defendant filed his motion to dismiss upon the ground that plaintiffs had failed to state a claim upon which relief can be granted [R. 229].

At the hearing upon said motion and by leave of court [R. 230], an amended complaint [R. 231-270] was filed, eliminating all reference to the constitutionality of the statute, to which amended complaint was attached by reference "Exhibit A" and "Exhibit B" attached to the original complaint [R. 44-228], being a complete transcript of the proceedings before the Postoffice Department and the Memorandum or Finding of Fact recommending the issuance of a fraud order, respectively, and the motion to dismiss was deemed to be lodged against the Complaint as Amended.

On March 4, 1946, the District Court reluctantly granted the defendants' motion to dismiss upon the ground that the Postmaster General is an indispensable party on the authority of *Neher v. Harwood*, 128 F. (2d) 846, with which the Court stated it did not agree but felt bound to follow [R. 271-275]. The opinion appears in full in the Appendix to this brief.

On December 6, 1946, the Circuit Court of Appeals of the Ninth Circuit affirmed the judgment of the District Court in an opinion *per curiam*, upon the authority of *Neher v. Harwood, supra* [R. 286].

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In affirming the judgment of the District Court holding that the Postmaster General is an indispensable party.

(2) In affirming the judgment upon the authority of the case of *Neher v. Harwood, supra,* which case sustains the position of petitioners that the Postmaster General is not an indispensable party when his authority is questioned.

(3) In failing to observe and find that the statutory authority of the Postmaster General was expressly questioned by the complaint [R. 259, 264-265] and that he is not, for that reason alone, if for no other, an indispensable party to the action, since the question of his statutory power is one of law to be determined in any appropriate forum without his presence being necessary.

(4) In failing to follow the clear and unambiguous ruling of this Court in the case of *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, that "these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis."

(5) In disregarding the principle that, "Equity delights to do complete justice and not by halves," and in adhering to a formal and inapplicable rule of equity pleading, resulting in a conflict with the Circuit Court of Appeals of the Sixth Circuit and with applicable decisions of this Court.

ARGUMENT.

POINT I.

The Evidence of Fraud Presented Before the Postmaster General and Upon Which the Fraud Order Is Based Consisted Only of the Mere Expressions of Opinion of One Witness and Was Clearly Insubstantial.

Since the sole question here is whether or not the Postmaster General is an indispensable party, it is perhaps sufficient that the amended complaint expressly questions the statutory authority of the Postmaster General to issue the fraud order [R. 259, 264-265], for it is well settled that he is not an indispensable party when the question raised is his authority to act at all. (*Varney v. Warehime*, 147 F. (2d) 238, 242, *certiorari* denied, and cases there cited, including *Neher v. Harwood*, 128 F. (2d) 846.)

On the other hand, it may be of some interest and perhaps assistance to the Court to consider the evidence before the Postmaster General upon which the fraud order is based, since the authority of the Postmaster General to act depends upon whether or not he has before him evidence of fraud in fact or mere opinion evidence, for he has no discretion in the presence of opinion evidence alone.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94; and more than one hundred cases in which it is cited and approved;

Jarvis v. Shackleton Inhaler Co., 136 F. (2d) 116, (6th Cir. 1943);

Pinkus v. Walker, 61 Fed. Supp. 610 (N. J. 1945).

The appellee before the Circuit Court of Appeals refused to concede that the fraud order here in question is based solely upon opinion evidence, although the District Court, in its opinion, stated that "In the instant case, except for the evidence of mailing and a chemical analysis of some food tablets—and the chemical analysis bore out the plaintiff's representations—there was no evidence at all before the Postmaster General except the testimony of an employee of the Food and Drug Administration of the Government, who testified as a medical expert as to the efficacy, in his opinion, of plaintiff's plan of reducing obesity." [R. 272-273.]

The testimony before the Post Office Department appears on pages 44 to 218, inclusive, of the Transcript of Record.

There were four witnesses for the Department and one for the respondent.

(a) The first witness was a Post Office Inspector who established certain test correspondence which brought to the Post Office Department literature containing representations [R. 57-90] admittedly made by petitioner, Al Williams, but which differ in several material respects from the charges. [Para. XV, Amended Complaint, R. 238.]

(b) The second witness was a chemist from the Food and Drug Administration who gave the weight and chemical analysis of the tablets and massage creme, revealing that the tablets weighed 12.65 grains each and consisted of 1.14 grains sodium and potassium oxides; kelp 30.38 grains; .10 grains iron and .35 grains calcium oxide, with a trace of iodine, and that the massage creme contained .12% phenol; .25% volatile oils and 75.5% water incorporated in a greaseless base. [R. 91-94.]

(c) The third witness was a microanalyst from the Food and Drug Administration, who testified that he had made a microscopic analysis of the tablets revealing that they contained 17 vegetable concentrates only. [R. 94-102.]

(d) The final and key witness for the Postoffice Department was a Doctor of Medicine from the Food and Drug Administration, who testified that he received the degree of M.D. at Harvard University Medical School in 1934 and from 1934 to 1938 was interne in several hospitals in Boston, Massachusetts, and from 1938 to 1939 he was on active duty with the United States Army, assigned to the Civilian Conservation Corps, and from 1939 to 1941 he was a medical officer for the Veterans' Administration, Washington, D. C., and that since 1941 he had been with the Food and Drug Administration, where his duties include the examination of labels to determine whether or not they comply with the Food, Drugs and Cosmetics Act; that his experience as a practicing physician was as follows: He was licensed in 1936 to practice medicine in the State of Maine and in Massachusetts, and in 1942 was licensed to practice in the District of Columbia, where he had since practiced; that he is and since 1941 has been a clinical instructor in medicine at the George Washington University School of Medicine, Washington, D. C.; that he is on the Dispensary Staff of Emergency Hospital in Washington, as well as an associate visiting physician at Gallinger Hospital in Washington, and that he has been an associate of the American College of Physicians since 1942; that he did not practice in Maine but did practice for short spaces of time in Massachusetts in between appointments at hospitals, but nothing very extensive; that

he never practiced over a three-month period at any one time; that since 1942 his practice has been limited to internal medicine and that his present private practice is limited to evening hours and week-ends, including Sundays, which does not relate to any of his official duties with the Food and Drug Administration. [R. 103-106.]

The testimony of this witness was the sole basis offered by the Post Office Department to support the charges of "false and fraudulent pretenses, representations and promises." These charges appear in the Transcript of Record on pages 45 to 46 and an additional charge was added by letter addressed to petitioner Williams at Los Angeles and mailed at Washington, D. C., two days before the hearing date. [R. 47.]

The representations and promises supplied by the testimony of the Postal Inspector [R. 59-90] are all admitted but differ materially from the charges in several respects. [Para. XV, Amended Complaint, R. 238-239.]

That the testimony of this key witness for the Post Office Department amounts only to expressions of opinion as distinguished from factual evidence and is insubstantial in character and that the complaint giving rise to the proceedings culminating in the fraud order, came from sources other than users of petitioner's reducing program, are conclusions reasonably to be drawn from a study of the testimony of the witness found on pages 103 to 217, inclusive, of the Transcript of Record.

The unstable and theoretical character of the testimony of this witness is apparent from the portions thereof which follow and which are ample reasons for the proposition that the ruinous and devastating results of a fraud order were never intended to depend to any extent upon

opinion evidence or upon anything less than substantial evidence having a basis of fact rather than theory.

The testimony appearing in the Transcript of Record, pages 108-115, inclusive, clearly indicates the fact that the accused were being judged entirely by mere opinions and, indeed, by the standards and opinions of the witness who makes the principal claim that the information or case history sought by petitioner Al Williams, who has had 25 years of actual and successful experience in weight reduction, was inadequate to determine whether or not it was safe for the person to reduce. A comparison of the information or case history required by petitioner and that which the witness claimed is necessary, appears on page 244 of the Transcript of Record.

That the testimony of this key witness is too unstable to constitute substantial evidence appears from the following comparison of his statements, viz.:

> "Q. Would the taking of these so-called food tablets take that hunger away? A. It would not." [R. 126.]
>
> "Q. You have indicated that there is a possibility or I believe you have, that if one takes these tablets with fruit juice or buttermilk or the others the hunger pains might disappear? A. Yes, they may." [R. 154-155.]

The method of taking the tablets required by the reducing program was "with ½ glass of fruit juice, skim milk, hot broth or water." [R. 81-82.]

It is quite apparent that, for whatever reason, the main contention of the witness and the Post Office Department

is that no attempt should be made to accomplish weight reduction, except under the supervision of a Doctor of Medicine, viz.:

> "Mr. Mindel: They don't say go to your doctor and see whether or not the system is going to hurt you or help you." [R. 111.]

Also:

> "Q. Now as I understand your testimony you believe that anybody who may be obese should first consult a physician if he desires treatment. Is that your position? A. I think that is the sensible thing to do.
>
> Q. Well, you say sensible thing, you think that should be done, don't you? A. I certainly think we should be sensible." [R. 144.]

That all of the testimony from this witness was purely opinion evidence as distinguished from factual evidence, appears not only from the very nature of his statements, but from his own admission also, viz.:

> "Q. Doctor, does the testimony you have given here today represent the consensus of modern medical opinion? A. It does." [R. 135.]

But other Doctors of Medicine do not agree with the statements of the witness to the effect that the cessation of hunger pains is directly proportionate to the number of calories put into the stomach or that the food tablets or creme would not perform the functions claimed. When it appeared that the Post Office Department was depending upon opinion evidence, petitioner Al Williams asked that the case be reopened for the purpose of taking the depositions in Los Angeles, of Doctors of Medicine familiar with said reducing program, and who could not at-

tend at Washington by reason of restricted travel accommodations and demands upon their professional time, and the affidavits of two such doctors supported the motion, which was denied. [R. 261-264.]

Finally this witness states that the main question at issue could be easily determined as a fact by the use of a kymograph in any laboratory, viz.:

> "The Witness: I would say that testimonial had no value. An individual who takes two tablets with a glass of buttermilk or skim milk and then has disappearance of hunger pains does not know whether the hunger pains disappeared due to the effect of the tablets or to the effect of the juice or milk or soup that went with it, or to both. He doesn't know anything. All he knows is that the hunger pains went away if they did. To determine whether or not the hunger pains were eliminated, if they were, by the tablets, one would have to set up a control experiment and a scientifically controlled experiment can be done in any laboratory by the use of a kymograph that I mentioned and the balloon in the stomach and so on. One could really find out the effect of the various things that are put into the stomach on hunger contraction that way." [R. 153-154.]

It can be fairly assumed that the Food and Drug Administration, by whom the witness was employed, has a laboratory, but apparently no scientific tests were made to determine the fact, so petitioner Williams offered to pay for the making of such tests at the University of Southern California, and moved to reopen the case for that purpose, but the motion was again denied. [Findings of the Post Office Department, R. 228.]

Appellant was denied the right to testify before the Post Office Department concerning the results of his long experience with the preparations used in connection with the reducing program.

The Findings of the Post Office Department further state that appellant Al Williams, who had spent 25 years studying and practicing weight reduction and 10 years using concentrated foods in connection with his reducing program and particularly the tablets in question, was not permitted to testify "because he was not qualified to give expert medical testimony" [R. 227, 156-216], and then the case seems to have been decided upon the ground that petitioner "offered no expert medical testimony." [R. 227.]

In *U. S. Smelting Co. v. Parry*, 166 Fed. 407, it was stated by Judge, later Justice Van De Vanter, that the rule which prohibits a non-expert witness from testifying as to his opinion or conclusion never was intended to to close any reasonable avenue to the truth in the investigation of questions of fact and that the most important qualification of the general rule is the one which permits a witness possessed of special training or experience to testify to his opinion.

The petitioner Williams and his attorney were entirely unable to produce medical testimony at the hearing before the Post Office Department. They were 3000 miles from home and unacquainted in Washington, D. C., and there were no medical men there known to them who were acquainted with the tablets or creme and their time was limited. They were at the beginning, ignorant of the fact that the Post Office Department would base the entire charge on the opinion evidence of a medical practi-

tioner and exclude the testimony of petitioner Al Williams, who used the tablets himself and observed the workings of the plan on many thousands of users over a long period of years.

Petitioner did the only thing open to him in order to save his business and reputation from complete ruin. He made an effort to reopen the case in order to take the depositions of medical men familiar with his program and to secure scientific tests.

Finally, much of the testimony of the key witness for the Post Office Department deals with expressions of his opinion as to whether or not the reducing program was "strict," "easy" or "safe" [R. 112-117, incl.] as claimed. In the case of *Carlay Co. v. Federal Trade Commission*, 153 F. (2d) 493, 496, petitioners represented that excessive weight could easily be removed from the human body by using certain candy before eating. The Court, in determining whether or not there was substantial evidence, said:

> "The Commission says that carrying the plan into execution is not 'easy.' The term obviously is one of comparative or relative connotation . . . This, comparatively speaking when one thinks of reduction of obesity, anyone must declare comparatively simple, comparatively easy. Consequently there is nothing deceptive in the advertising in this respect. What was said was clearly justifiable under the circumstances, under those cases recognizing that such words as 'easy,' 'perfect,' 'amazing,' 'prime,' 'wonderful,' 'excellent' are regarded in law as mere puffing or dealer's talk upon which no charge of misrepresentation can be based." (Citing cases.)

The decision also deals with the matter of substantial evidence and states that "substantial evidence is more than a mere scintilla."

Petitioners submit that there was no substantial evidence before the Postmaster General and no evidence of actual fraud in fact but that mere opinion formed the sole basis of the fraud order.

POINT II.

There Are Two Reasons Why the Postmaster General Is Not and Should Not Be an Indispensable Party to This or Any Similar Action Under These Statutes, i. e., (1) He Has No Authority to Issue a Fraud Order Solely Upon Opinion Evidence and He Has No Discretion When Only Opinion Evidence Is Before Him, and (2) the Principles of Equity and Practical Justice Require That Recourse From the Ruinous Effects of a Fraud Order Shall Be Immediate in Order to Forestall the Serious Damage to Reputation and Property, Until the Case Can Be Heard on the Merits, and One Should Not Be Required to Seek a Distant Forum Where the Presence of the Postmaster General Would Not Be Likely Anyway.

(1) The legitimate reducing business of petitioner Al Williams has been completely destroyed and his good reputation as well as that of petitioner Al Williams Health System of Los Angeles, Inc., and its successful and extensive conditioning business, have been irreparably injured by the mistaken, unauthorized and unwarranted act of the Postmaster General. To safeguard and preserve our individual rights and liberties is the function

of the judiciary, as stated by the Supreme Court in *Stark v. Wickard*, 321 U. S. 288, 309, as follows:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect judiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

This power was exercised by the Supreme Court of the United States in the case of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, which has since been cited with approval more than one hundred times and as late as February 4, 1946, in the case of *Estep v. United States*, 90 Sup. Ct. Law Ed., 405, 408.

Complainants in the *McAnnulty* case had founded a business upon the proposition that the mind of the human race is largely responsible for its ills and taught and practiced healing through exercise of the faculty of the brain and mind. The Court said:

> "Can such a business be properly pronounced a fraud within the statutes of the United States? . . .
>
> "Because the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers of the individual, and directing them toward the accomplishment of a cure of the disease under which he might be suffering,

who can say that it is a fraud or a false pretense or promise within the meaning of the statutes?

"How can anyone lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by complainants and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court . . .

". . . As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud.

"Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of

stopping the delivery of mail matter. Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.

"It may perhaps be urged that the instances above cited by way of illustration, do not fairly represent the case now before us but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a larger experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as a matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes . . .

" . . . Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?

"That the conduct of the Post Office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the Courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statutes under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the Courts generally have jurisdiction to grant relief . . .

". . . The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the Courts therefore, must have power in a proper proceeding to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

The clear reasoning of this decision has never been questioned and the principles expressed have been recognized and followed by the courts in their struggle against technical rules which impede rather than contribute to substantial justice.

In *U. S. v. Johnson*, 221 U. S. 488 at 498, in determining what amounts to misbranding under the Food and Drug Act, the Court said:

> "We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. It was much more likely to regulate commerce in food and drugs with reference to plain matters of fact, so that food and drugs should be what they profess to be, when the kind was stated, than to distort the uses of its constitutional power to establish criteria in regions where opinions are far apart. See School of Magnetic Healing v. McAnnulty, 187 U. S. 94."

At a very early date this Court established the importance of the preservation of individual rights, in the case of *Ex Parte Jackson*, 96 U. S. 727, 732, as follows:

> "The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. *The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.*" (Emphasis added.)

Finally, in *Esquire v. Walker*, 151 F. (2d) 49, 54, in which the second-class mailing privilege was withheld by the Postmaster General, the Circuit Court said:

> "In this situation, assuming the existence of the power to censor, may a court review the issue of dominant vulgarity on its merits?

"The answer of the Government is an unqualified NO. It contends with some reason that this Court has no right to review the Postmaster General's notions of dominant vulgarity if they are supported by substantial evidence. It argues even more persuasively that no right minded man can brush aside as insubstantial the opinions of five clergymen (among whom is a bishop) on what is good for the public.

"We think the Government is clearly right in its contention once the power claimed by the Post Office is assumed to exist. There is a practical reason, apart from respect for the testimony of clergymen, why the administrative imposition of literary and artistic standards cannot be reviewed by a Court on its merits. Opinions on such matters differ so widely that if the evidence in the record before the Post Office were to be weighed each side would have to continue calling witnesses indefinitely in order not to be outweighed by the other. We have no doubt that thousands of reputable experts on the public good could have been obtained by each side in this case.

"We know of no way a Court can evaluate the comparative expert qualifications of persons who hold opinions on what the public should read. Once we admit the power claimed here we see no room for effective judicial review of its exercise. And so in practical effect it amounts to a power in the Postmaster General to impose the standards of any reputable minority group on the whole nation . . .

"We intend no criticism of counsel for the Post Office. They were faced with an impossible task. They undertook it with sincerity, but their very sincerity makes the record useful as a memorial to commemorate the utter confusion and lack of in-

telligible standards which can never be escaped when that task is attempted.

"We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."

This decision was affirmed in *Hannegan v. Esquire*, 90 Sup. Ct., Law Ed., 429, 433, February 4, 1946, this Court saying:

"And the Court held in Ex Parte Jackson, 96 U. S. 727, that Congress could constitutionally make it a crime to send fraudulent or obscene matter through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever . . .

"It is plain, as we have said, that the favorable second-class rates were granted periodicals meeting the requirements of the Fourth condition, so that the public good might be served through a dissemination of the class of periodicals described. But that is a far cry from assuming that Congress had any idea that each applicant for the second-class rate must convince the Postmaster General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accommodation for the widest varieties of tastes and ideas.

"What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don

Quixote, Shakespeare's Venus & Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system . . .

"To uphold the order of revocation would therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred."

(2) *The principles of equity and practical justice require that recourse from the ruinous effects of a fraud order shall be immediate in order to forestall serious damage to reputation and property, until the case can be heard on its merits.*

A full and comprehensive presentation of this phase of the question will be found in the Annotation to *Neher v. Harwood*, 158 A. L. R. 1126, 1139-1146.

As therein expressed, the issuance of a fraud order by the Postmaster General at Washington is something more than a mere decision regarding one's right to postal service, like a decision as to the rates to which he is entitled for a publication. It is something more even than a stoppage of the mail addressed to him, whether or not that mail be his property in the hands of a carrier. *It directs a deliberate and ruinous destruction of his reputation and good will.* These are recognized by the law as in the nature of property rights.

This being the case, the willingness of some courts to permit immediate procedure against the local postmaster appears commendable as a matter of practical justice. And as to legal theory, it is this postmaster who is threatening or actually inflicting the harm. It is for him to show his official warrant permitting him to do so.

The case does not necessarily fall within the rule against collateral attack on the judgment. His superior, the Postmaster General, has not rendered even a quasi-judicial judgment. The plaintiff has had a hearing but not one subject to direct appeal or even to *certiorari*. The very ground upon which the statute is held to be constitutional is that his decision may be reviewed collaterally by a Court. *Public Clearing House v. Coyne* (1904), 194 U. S. 497.

It is said that the Postmaster General should be made a party because "his are the hands that are being tied" and he is "entitled to be heard in defense of his actions"; but, on the other hand, that official is perfectly at liberty to defend through the local postmaster as his agent. It is never an objection to an injunction against the acts of an agent within the Court's jurisdiction, that his principal, without that jurisdiction, is the one to be bound, or is entitled to be heard. As to the official convenience requiring the hearing to be at Washington, it is to be observed that the records of the Department may be all that are required from that end. The personal presence of the Postmaster General would not be likely even in Washington. Unless the injured party can get a preliminary injunction or restraining order speedily, the harm may be done before he can even proceed to a hearing there. Indeed, in most if not all such cases, the transcript of the entire proceedings before the Post Office Department, is, of necessity, before the Court.

The case of *Varney v. Warehime*, 147 F. (2d) 238, 6th Circuit (*Certiorari* denied), was an action by a milk producer against a Milk Market Agent to enjoin the operation of certain provisions of an order of the

War Food Administrator. Upon the question as to whether the War Food Administrator was an indispensable party, the Court said:

"The decisions on this question are conflicting and the position of the Courts is therefore uncertain. Under these conditions it is our duty to follow the decisions which we conceive to be based on the sounder reasoning. Matters of convenience and necessity are entitled to consideration. Citizens should not be compelled to seek a distant forum for litigation of their controversies with the government, and likewise, public officials should not be compelled to neglect their duties to answer charges of usurpation of power in a distant forum.

"(1) Approaching the subject from a practical standpoint, we need not overlook the fact that the question of constitutional or statutory power of a public official is usually a question of law, and may be determined in any appropriate forum without the personal presence of the superior government official.

"(2, 3) The right of intervention is available to a superior official in any suit where his subordinate is made a party defendant. Governmental regulations under present circumstances are so widespread and affect such a vast number of our people that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the court is such an agent in the matter involved that it is reasonable to proceed to an adjudication of the issue with finality. We adhere to the rule that where

the plaintiffs in an action are not seeking to prevent subordinates from executing a discretionary order of their superior but are challenging the power of the superior to make the regulation, it is not necessary to have the superior officer before the court. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90; Public Clearing House v. Coyne, 194 U. S. 497, 24 St. Ct. 789, 48 L. Ed. 1092; Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143; State of Missouri v. Holland, 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984; State of Colorado v. Toll, 268 U. S. 228, 230, 45 S. Ct. 505, 69 L. Ed. 927; Brooks v. Dewar, 313 U. S. 354, 360, 61 S. Ct. 979, 85 L. Ed. 1399; Neher v. Harwood, 9 Cir., 128 F. 2d 846; Jarvis v. Shackleton Inhaler Co., 6 Cir., 136 F. 2d 116."

A similar case and ruling is found in *Greer v. Cline*, 148 F. (2d) 380, Sixth Circuit (1945).

In the case of *Jarvis v. Shackleton Inhaler Co.*, 136 F. (2d) 116, Sixth Circuit, appellee was in the business of manufacturing and marketing an inhaling compound and a device for its use and represented that it would prevent colds, inhibit the development of germs and prevent such organisms from spreading, and is "a proper and effective substitute for change of climate when such change is essential in cases of respiratory disorders," and other representations. The Court said:

(3) "The power of a Court of equity to review the order is limited. It extends no further than to

determine whether there is substantial evidence in fact, as distinguished from opinion, to support the order. If there is, the case is foreclosed against appellee. If there is not, it follows that appellee has suffered irreparable injury to its property rights. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90; see, also, Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789, 48 L. Ed. 1092."

The evidence before the Post Office Department in that case consisted of pamphlets including excerpts from testimonial letters; analysis of the compound and the opinion of a doctor who stated that the substances in the preparation were well known; that they did not appear in the preparation in sufficient volume to have any germicidal effect and that the results claimed in the testimonials could not be attributed to the preparation because so many other factors entered into the case.

The Court held that there was no substantial evidence of fraud and that the fraud order was void, and further concluded that the principal question involved was whether the Postmaster General was an indispensable party to the suit. After quoting the various decisions reflecting the status of the question, the Court said:

(6) "The task of harmonizing these decisions is almost, if not altogether, impossible, and following the lead of Brooks v. Dewar, *supra*, we are reluctant to undertake it. We are content to decide the question on the record before us. We have already stated

the general rule. The rule grew out of the age-old maxim of equity jurisdiction, *i.e.*, 'Equity delights to do complete justice and not by halves.' The maxim sprang in turn from the desire of the early chancery courts to determine all matters involved in the litigation so that no roots of controversy would remain out of which other suits might spring. To accomplish this purpose, the courts required that all persons interested in the subject matter of the suit should be made parties so that its decree would bind them all. But courts of equity observe general rules only to the extent to which they contribute to the attainment of justice. They do not adhere to any rule which would defeat justice and thus destroy the very purpose for which they were created. Pomeroy's Eq. Jurispr., 4th Ed., Vol. 1, Sec. 60; Story's Eq. Pl., 8th Ed., Sec. 135a; Birdsong v. Birdsong, 39 Tenn. 289, 301."

(7) "We think appellee has made out its case. Upon the record it was conducting a lawful business. The fraud order was void as a matter of law. Appellant was excluding appellee from the use of the mails without authority. He was destroying appellee's mail order business, which was ninety-five per cent of the whole. He was almost, if not altogether, a trespasser upon appellee's rights and privileges. It is true enough that he was not wilfully committing a wrong. Be it said to his credit, that he was only obeying orders, but he was acting unlawfully and the effect was the same. A stronger case for injunctive relief can hardly be stated. The Postmaster General did not seek to intervene. If he had done so, he

would have been bound upon the question of the validity of the fraud order upon the record as made, just as we have indicated appellee was bound by it.

"Under these circumstances what course should the District Judge, sitting as a Chancellor, have pursued? Should he have turned appellee out of court and sent it to Washington for a second contest over the same matter? The dismissal of the bill would have been disastrous to appellee and the expense incident to new litigation hundreds of miles from home would have been equally crushing because its business, grossing only a few thousand dollars a year, would have been burdened with the extra expense of the new litigation. The District Judge made the injunction final and we think that this was right. It would have been unjust and inequitable to have dismissed the bill for no other or better reason than adherence to a formal, and what we regard as an inapplicable, rule of equity pleading.

"Courts of equity have always struggled against technical rules which impede rather than contribute to substantial justice."

The *Shackleton* case pretty well presents the situation here and is followed in all respects by *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J., 1945), which is also a fraud order case involving the sale of a reducing program.

POINT III.

The Ruling of the Circuit Court of Appeals of the Ninth Circuit in Affirming the Judgment of the District Court in This Case, Entirely Disregards the Clear Principle Established by This Court in American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, That the Postmaster General Is Without Authority or Discretion in the Presence of Opinion Evidence Alone.

The judgment of the Circuit Court in this case is based entirely upon its former ruling in the case of *Neher v. Harwood, supra,* although the cases differ widely in basic facts and particularly in the fact that *the evidence before the Postmaster General in the case of Neher v. Harwood included the testimony of a user of the scheme involving the cosmic generator to the effect that the claims made were false and untrue by actual test,* while the evidence to establish fraud in the instant case consists only of the mere expressions of opinion of one witness.

The opinion and ruling of the District Court also turns entirely upon the decision by the Circuit Court in the case of *Neher v. Harwood* [R. 271-275].

In the Memorandum Opinion of the District Court it is stated as follows:

> "this Circuit in Neher v. Harwood, 128 Fed. (2d) 846, decided in 1942, and is the last expression of this Circuit on the subject, has specifically held that the McAnnulty case is not authority for the non-joinder of the Postmaster General as a party. The case, as I have indicated, is in direct conflict with the decisions of the Sixth Circuit" [R. 274].

Petitioners do not claim that the *McAnnulty* case is authority for the non-joinder of the Postmaster General,

but do claim that it holds that the Postmaster General has no authority to issue a fraud order on opinion evidence alone and if he does so that the order is void.

Petitioners further claim that *Neher v. Harwood* holds that the Postmaster General is not an indispensable party when his authority to act is questioned.

In the instant case the Postmaster General acted beyond his authority by issuing a fraud order upon opinion evidence alone and it naturally follows by the authority of the *McAnnulty* case and *Neher v. Harwood* taken together, that he therefore is not an indispensable party.

In the case of *Neher v. Harwood*, the Court said (page 848):

> "The appellant in the instant case has urged that the case of America School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90, which was one of the very cases to which the Supreme Court referred in the above question, is authority for their contention that the local Postmaster may be sued without the joinder of his superior officer. It is apparent that the case is not authority on the point."

Petitioners do not claim that the case is authority on the point because that point was never mentioned in the *McAnnulty* case although it does hold that the question of the statutory authority of the Postmaster General is a question of law. The case holds further that the Postmaster General acts beyond his authority and is guilty of a mistake of law when he issues a fraud order upon opinion evidence alone and in such case the fraud order is void. The case of *Neher v. Harwood* itself supplies the

only other point necessary to uphold appellant in the instant case, to-wit: That when the Postmaster General exceeds his authority in issuing a fraud order, he is not an indispensable party defendant but the local postmaster may be sued alone.

The *Neher v. Harwood* opinion refers once more to the *McAnnulty* case, as follows (page 853):

> "Appellant has patterned his complaint upon the case of McAnnulty, *supra*, and relies upon that case. The facts of the two cases are not parallel. There there was involved a school for the understanding mind. Here no understanding of any kind is premised. We hold that no cause of action was stated."

In the *McAnnulty* case the Court went to some length to establish that its ruling applied equally to all cases in which opinion formed the basis rather than existing facts.

The Circuit Court completely ignored the fact that the complaint in this action is based upon the express claim that the Postmaster General had no authority to issue the fraud order in question and that the order is void [R. 259, 264-265] for the reason that he had no authority to act at all upon the evidence before him. The clear ruling of *Neher v. Harwood, supra*, is that:

> "Where he was without authority to act at all in the premises his actions assuming to authorize action by the subordinate were of no validity and left the subordinate as the actor subject to restraint."

If, therefore, the Postmaster General is without authority to issue a fraud order upon opinion evidence alone, which is the clear and positive ruling in the *McAnnulty* case, *supra*, the case of *Neher v. Harwood* is itself authority for holding that he is not an indispensable party.

POINT IV.

The Sixth and Ninth Circuit Courts of Appeals Are in Conflict as to Whether or Not the Postmaster General Is an Indispensable Party to an Action to Enjoin the Enforcement of His Fraud Order by the Local Postmaster.

NINTH CIRCUIT.

The authority upon which are based the judgments of the Circuit and District Courts in the instant case, is *Neher v. Harwood*, 128 F. (2d) 846, Ninth Circuit (1942), which holds that the Postmaster General is not an indispensable party to the action when his authority to make the order is questioned.

The case seems to intimate that this authority must be questioned upon the ground that the statute is unconstitutional and refuses to recognize any other ground as a basis for questioning that authority.

As was said by Mr. Justice Holmes and Mr. Justice Brandeis dissenting in the case of *Leach v. Carlisle*, 258 U. S. 138, 140:

> "The statute under which fraud orders are issued by the Postmaster General has been decided or said to be valid so many times that it may be too late to expect a contrary decision."

So that any question of the authority of the Postmaster General upon constitutional grounds appears futile as evidenced by the holding of the District Court in the *Neher* case that "no substantial constitutional question is involved." The result of *Neher v. Harwood*, therefore, is that the Postmaster General is an indispensable party unless the foundation of his authority is questioned upon.

the ground of unconstitutionality of the statute and, when so questioned, no substantial constitutonal question is involved because the constitutionality of the statute has been decided many times.

Consequently the result of *Neher v. Harwood* is to require everyone against whom the Postmaster General issues a fraud order, to go to Washington to file the action which would make immediate relief out of the question. The further result is that it is impossible to obtain quick relief in the Ninth Circuit in cases in which the Postmaster General has acted upon the most insubstantial evidence or upon opinion evidence of the most insubstantial character.

The Ninth Circuit Court of Appeals clearly ignores and refuses to follow the definite and positive ruling of this Court in the *McAnnulty* case, that the Postmaster General has no authority under these statutes to issue a fraud order upon opinion evidence alone, and if he does so, he acts under a mistake of law and his act is void.

It should be stated further that the statutory power of an administrative official is a question of law which can be decided in any appropriate forum without his presence being necessary. *Varney v. Warehime*, 147 F. (2d) 238, 242.

Jarvis v. Shackleton Inhaler Co., 136 F. (2d) 116, Sixth Circuit (1943), and *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J., 1945), are both cases against the local postmaster alone in which it was sought to enjoin the

enforcement of a fraud order issued by the Postmaster General without joining him as a party. No constitutional question is involved.

Both cases decide that the Postmaster General is not an indispensable party because courts of equity observe general rules only to the extent to which they contribute to the attainment of justice and that they do not adhere to any rule which would defeat justice and thus destroy the very purpose for which they were created. The *Pinkus* case from a District Court in the Third Circuit follows the case of *Jarvis v. Shackleton* in the Sixth Circuit and both cases cite and follow the *McAnnulty* case and hold that the Postmaster General has the right of intervention if he so desires.

SIXTH CIRCUIT.

Varney v. Warehime, 147 F. (2d) 238, Sixth Circuit (1945), and *Greer v. Cline*, 148 F. (2d) 380, Sixth Circuit (1945), were both cases involving the question of whether or not the War Food Administrator was an indispensable party to an action seeking to enjoin his subordinate, the local Inspection Supervisor.

The Court decided in both cases that "governmental regulations under the present circumstances are so widespread and effect such a vast number of our people that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the Court is such an agent in the matter involved that it is reasonable to proceed to an adjudication of the issue with finality." and ruled that the superior was not an indispensable party.

Conclusion.

It would appear, therefore, that there is a sharp conflict upon this question between the Sixth and Ninth Circuit Courts of Appeals and that the Circuit Court of Appeals for the Ninth Circuit has decided an important question of general law in a way probably untenable and in conflict with the weight of authority and probably in conflict with applicable decisions of this Court.

Petitioners further believe that there is here involved an important question of Federal law not previously settled, which is of such wide importance and public interest and concern that it should be definitely decided by this Court.

Respectfully submitted,

IRVING M. WALKER,
Attorney for Petitioners.

RICHARD L. NORTH,
Of Counsel.

APPENDIX.

Opinion of the District Court in the Instant Case.

[Title of District Court and Cause]

Reporter's Transcript of Opinion

Honorable Peirson M. Hall, Judge Presiding

Los Angeles, California, March 4, 1946

Appearances:

For the Plaintiff Richard L. North, Esq., 402 Merritt Building, Los Angeles, California.

For the Defendant: Charles H. Carr, United States Attorney; by Ronald Walker, Assistant United States Attorney.

Los Angeles, California, March 4, 1946:
10:00 o'clock A. M.

The Court: In the matter of Williams v. Fanning, the matter was submitted and the parties have nothing further to offer?

Mr. Walker: Nothing further on behalf of the defendant.

Mr. North: Nothing further, Your Honor.

The Court: In this matter I haven't written an opinion but I made a very short memorandum because the matter is one of injunction and urgency so I want to announce my opinion this morning.

The Los Angeles Postmaster, by the United States Attorney, seeks dismissal of this action to enjoin him from enforcing a fraud order against the plaintiff on the

ground that the Postmaster General is an indispensable party.

There is a welter of decision on the subject, so much so that in 1940 the Supreme Court remarked, in Brooks v. Dewar, 313 U. S. 354, that they were "not disposed to attempt a critique of the authorities."

There is direct conflict between the Sixth Circuit and the Ninth Circuit, and the District Court of New Jersey, which is in the Third Circuit, in July of 1945 followed the Sixth Circuit in Pinkus v. Walker, 61 Fed. Supp. 610.

In the Sixth Circuit cases (there are two of them), Jarvis v. Shackelton, 136 Fed. (2d) 116 (June, 1943), and Greer v. Kline, 148 Fed. (2d) 380 (March, 1945), as well as Pinkus v. Walker, all adhere to and follow the doctrine of the American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, to the effect that if there is no substantial evidence of actual fraud in fact, and only opinion evidence before the Postmaster General, to support a fraud order, then the order of the Postmaster General is beyond his authority in law and he is not an indispensable party.

The McAnnulty case, as recently as February 4, 1946, was cited by the Supreme Court in a selective service case, Estep v. U. S., as being authority for the proposition that the courts have the power to review factual findings to determine whether or not, by virtue of the lack of evidence, there has been an excess of lawful authority of the administrative body or board.

In the instant case, except for the evidence of mailing and a chemical analysis of some food tablets—and the chemical analysis bore out the plaintiff's representations—

there was no evidence at all before the Postmaster General except the testimony of an employee of the Food and Drug Administration of the government, who testified as a medical expert as to the efficacy, in his opinion, of plaintiff's plan of reducing obesity. Although the record shows that upwards of 50,000 persons had used plaintiff's plan in whole or in part, which included not only dieting but exercises in some cases as well, not one of them, nor any other person, was produced to testify as to any matter at all. The plaintiff was excluded from testifying as to his actual experience with his plan on persons other than himself. And on a motion for reopening to permit medical testimony on behalf of the plaintiff, the motion was denied although the hearings were held in Washington, D. C., and the plaintiff had no notice of the plan of the Postmaster General to produce or rely on medical opinion evidence.

The McAnnulty case is clearly authority for the proposition that the statute does not authorize the Postmaster General to be an arbiter of medical opinion and to use the terribly effective power of the denial of the mails based solely upon that opinion. In Hannegan v. Esquire, decided February 4th of this year, where the Supreme Court construed the second class mailing statute, they held there that the powers, although just as great under that statute in the Postmaster General as in the fraud statute, did not authorize him to be an arbiter of what was literature or what was art or what was moral.

In the instant case, having read the entire transcript, I find that there is no substantial evidence to support the fraud order of the Postmaster General. And I would follow the decisions of the Sixth Circuit were it not for the fact that this circuit, in Neher v. Harwood, 128 Fed.

(2d) 846, decided in 1942 and is the last expression of this circuit on the subject, has specifically held that the McAnnulty case is not authority for the non-joinder of the Postmaster General as a party. The case, as I have indicated, is in direct conflict with the decisions of the Sixth Circuit. While it is true that the plaintiff, by being denied the injunction, is being turned out of this, the court of his residence, and will be forced to go almost 3000 miles to the District of Columbia to secure jurisdiction of the Postmaster General, which in normal times is no small inconvenience and expense, and in these times requires the foresight and planning almost of a major expedition, and while it is true that the Postmaster General can actually and in fact present any and all defenses to the courts of this district through the office of the United States Attorney as well and as easily as could be done in the District of Columbia, inasmuch as the power of any court in this kind of a case is limited to reviewing the naked record, so that driving the plaintiff out of these courts to the District of Columbia, where the Postmaster General lives, is paying obeisance to an outmoded, if not a ridiculous, fiction, I nevertheless feel bound to follow the Circuit Court of Appeals of this district as laid down in Neher v. Harwood, with which conclusion, I might say, I do not agree, and must and do reluctantly hold that the Postmaster General is an indispensible party and will be compelled to so hold until the Ninth Circuit and the Sixth Circuit come into harmony in their opinions, or the Supreme Court resolves the conflict between them.

The motion of the defendant to dismiss is granted, which being so it is unnecessary to pass on the motion for a preliminary injunction.